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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE R. REDFEARN,

Defendant and Appellant.

B203249

(Los Angeles County
Super. Ct. No. PA056081)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charles S. Peven, Judge. Remanded with directions, but otherwise affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.
Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Lee Redfearn was convicted of one count each of assault with a firearm, kidnapping to commit robbery, attempted second degree robbery and possession of a firearm by a felon and seven counts of second degree robbery. Firearm, prior conviction and prison prior allegations were found true. He was sentenced to state prison for an indeterminate term of 29 years to life plus a determinate term of 22 years, 4 months. Redfearn appeals, claiming (1) the trial court improperly limited defense counsel's closing argument, (2) the evidence was insufficient to show that his prior conviction constituted a serious felony and (3) the abstract of judgment contradicts the oral pronouncement of judgment.

The People concede and we agree that the matter must be remanded to the trial court for a new trial on the allegation that Redfearn's prior conviction constituted a serious felony; otherwise, the judgment is affirmed.

FACTUAL AND PROCEDURAL SYNOPSIS

On May 7, 2006, at about 12:50 a.m., Arman Cunanan was waiting for his father to pick him up on the corner of Reseda and Chase in Northridge. He had just completed his shift at a Chuck E. Cheese restaurant half a block away. He noticed Redfearn running and thought he was a jogger. Redfearn ran up to Cunanan, pulled a gun from his waistband and loaded it with a long ammunition magazine. Cunanan heard the "click" as Redfearn pulled something on the gun backwards.¹ Pointing the gun at Cunanan, Redfearn said, "Give me your money."

¹ Cunanan later identified the gun with a long magazine as a Tec-9 after seeing one in a video game.

Cunanan turned over his wallet which held \$3. Redfearn demanded more money and told Cunanan to go to the ATM. “Frightened for [his] life,” Cunanan suggested the nearby 7-Eleven at Reseda and Roscoe. As they walked, Redfearn told Cunanan, “If you say anything to anybody, I’ll kill you.”

When they reached the 7-Eleven ATM, Cunanan purposely entered the wrong PIN number so he was unable to get cash. Redfearn told him to get money from the register so Cunanan bought cigarettes and requested \$10 cash back. (The surveillance tape from the 7-Eleven was played for the jury.) Cunanan gave Redfearn the money. Redfearn told Cunanan he would come back the following night at midnight and get more money from him. Redfearn said for Cunanan to take a walk with him, but Cunanan refused. Redfearn asked for Cunanan’s ID card, and Cunanan gave Redfearn his brother’s ID. Redfearn left.

Cunanan called 911 from his cell phone, and the police responded in five to ten minutes. Cunanan told the officers the robber was a Hispanic male, 5’ 10”, bald with brown eyes, wearing a hooded sweater, and weighing 180 to 190 pounds.

On June 18, at about 1:00 a.m., a group of friends—Luis Delatorre, Robert Diaz, Aaron Plascencia, Alan Huerta, Richard Carranza, Roberto Rosales, Fernando Dehoyos and Alejandro Carranza—gathered in the parking lot at the Chuck E. Cheese restaurant in Northridge. Several were employees at the time.

At about 1:15 a.m., Delatorre was talking on his cell phone and standing about 25 feet away from the group. A Mustang drove into the parking lot and stopped near Delatorre. Redfearn got out of the passenger seat and yelled out, “Where are you from?” Delatorre said, “From nowhere.” Redfearn pointed a Tec-9 at Delatorre and said, “Give me your wallet.” When Delatorre said he did not have his wallet—just his phone—Redfearn demanded that and Delatorre turned it over. Delatorre ran to his friends and Redfearn approached the group. The Mustang’s driver called out to Redfearn to leave them alone because they were “a bunch of youngsters,” but Redfearn said, “I’m doing this for my daughter.” Redfearn continued toward the group.

Pointing his TEC-9 at everyone, sweeping it in a side-to-side motion, he demanded wallets from everyone. Diaz, Plascencia, Huerta, Richard Carranza and Rosales threw their wallets toward Redfearn, over the car separating them from him. Redfearn gathered the wallets, then pointed the gun at the group as he backed toward the Mustang and got in. He continued pointing the gun out the window at them as the Mustang pulled away.

Several of the victims tried to follow the Mustang in their own cars but returned to the lot without success. When police arrived, they gave descriptions.

Dehoyos said the robber was 5' 6" or 5' 7", 150 to 160 pounds, in his early twenties, with a moustache, teardrop tattoo near his eye and gaps between his teeth. He was wearing a Dodgers baseball cap and dark hooded sweater with a zipper. The next day, a detective showed him several six-pack photo lineups, and Dehoyos identified Redfearn's picture in position number five from one of the lineups. He wrote, "Number five looks like the suspect that approached me with the gun." Dehoyos identified Redfearn at the preliminary hearing and at trial. He identified a gap in the photograph of Redfearn's teeth as the same gap he saw at the time of the offenses.

Delatorre described the robber as Hispanic, a little shorter than 5' 9", 170 to 180 pounds, in his late twenties and wearing a hat and black sweater. He said the robber had missing upper teeth or a "pretty big gap" in his teeth. After viewing a six-pack photo lineup, he was unable to make an identification.

Diaz told officers the robber wore a Yankees baseball cap and a black hooded sweater. He appeared to be missing teeth and had a "big gap." Diaz said the robber was Hispanic, about 5' 8", 190 pounds and about 25 to 27 years of age. At trial, Diaz said Redfearn looked like the robber, with the same build, facial features and skin color but was not 100 percent certain.

Plascencia said the robber had missing teeth or gaps in his teeth. In a six-pack he was shown two days after the incident, he circled Redfearn's picture and wrote: "In Lineup (A) I think number one and five look most like the guy who pointed the gun at me

and took my wallet. I think number five looks more like the person.” Plascencia identified Redfearn at trial.

Huerta said the robber was about 5’ 7”, 24 or 25 years old, 180 pounds, with a gap in his upper teeth. The gap looked similar to the gap in photographs of Redfearn’s mouth.

Richard Carranza said the robber was Hispanic, wearing dark clothing and a baseball cap, about 5’ 9” or 5’ 10” and in his twenties. He was unable to make an identification in the six-pack lineups.

Rosales said the robber was Hispanic, about 5’ 5” or 5’ 6”, with a moustache and wearing a hoody and baseball cap; he was unable to make an identification from the six-pack photo lineup.

Alejandro Carranza described the robber as 5’ 7” to 5’ 9”, about 170 to 180 pounds, with a moustache and wearing a blue Dodgers hat and black sweater with a hood. He did not identify anyone in a photo lineup but identified Redfearn at trial.

On June 20, 2006, Los Angeles Police Detective Matthew Plugge showed Cunanan (the first victim involved in the incident on May 7) a six-pack photo lineup with Redfearn’s photograph in the number five position. Cunanan identified Redfearn and told Detective Plugge the robber had “messed up teeth” or gaps in his teeth. On June 22 (the day of Redfearn’s arrest), Detective Plugge photographed Redfearn’s mouth and teeth, revealing gaps next to Redfearn’s right and left front teeth.

At trial, the People presented evidence of the facts summarized above. Cunanan identified Redfearn as the man who had robbed him and said the gaps he described to Detective Plugge were the same as those depicted in the photographs of Redfearn’s mouth. Detective Plugge estimated Redfearn to be about 5’ 7” and 165 or 170 pounds.

In addition, three birth certificates indicated Redfearn was the father of two girls (born in June 1993, and October 1996) and one boy (born in October 1996). The trial court judicially noticed the facts that May 7 and June 18, 2006, were Sundays.

In Redfearn's defense, a general contractor (Eric Tavitian) who had employed him from May to mid-June 2006 testified Redfearn usually arrived between 7:00 and 7:30 a.m. Monday through Friday; he never saw Redfearn with anyone driving a Mustang.

The program director at Orion House (Ann Negrete) where Redfearn resided from February to May 26, 2006, said Redfearn was listed on a head count as being present at the time of the counts involving Cunanan. A female employee on duty at that time was fired in June for unknown impropriety. Redfearn was asked to leave when he acted in an intimidating way toward someone at Orion House. The facility was not locked or very secure.

The jury found Redfearn guilty on all counts and found the firearm enhancements true. In a bench trial, the court found true the prior conviction and prior prison term enhancements. Redfearn was sentenced to state prison for an indeterminate term of 29 years to life plus a determinate term of 22 years, 4 months.

Redfearn appeals.

DISCUSSION

I. The Trial Court Did Not Improperly Limit Defense Counsel's Closing Argument.

According to Redfearn, as his "sole defense was alibi [as to the events of May 7, 2006, involving Cunanan] and the corollary of mistaken identification," he was deprived of his Sixth Amendment right to counsel because the trial court twice ruled defense counsel could not refer to "famous cases of mistaken identification." We disagree.

At one point, defense counsel argued: "[H]ow many times over the last five years have we heard about people who were identified as committing crimes, but fortunately there was scientific evidence that remained and progress has come so far." The prosecutor said, "Your Honor, improper argument." The trial court responded: "I'll sustain the objection as to that. We are just talking about this case."

Defense counsel continued: “We heard about misidentifications. I believe I can talk about misidentification, because that’s something in the common human experience. These things happen. And we are all aware of that. And one of the problems is looks like, think it is, may be him and number one, him and number three. What makes either one of those two guys not a viable suspect?”

After defense counsel argued the prosecutor failed to prove Redfearn had left Orion House on the evening of May 7, 2006, and that, given their youth, the witnesses were inattentive to detail, counsel argued: “Started reading the obituaries about a year ago. I know that’s kind of morbid. Friend of mine died. Didn’t know about it until after the fact. Grandmother said, well, it’s in the obituaries. Thank you, grandma. So started reading the obituaries. Started commenting about fascinating stuff, about look alikes that have passed away. Guy looked just like Ronald Reagan. For 25 years was on T.V. Ronald Reagan guy in England was falsely accused of a robbery.”

The prosecutor objected on the ground of improper argument. The trial court responded: “Once again, ladies and gentlemen, we are just trying this case so” Defense counsel resumed: “Right. We are just trying this case. . . . Just illustrative of my point. But that’s not such a far stretch.”

Defense counsel concluded his argument, emphasizing the identifications were mistaken: “[J]ust because they file a case doesn’t mean they are right. Because they have been wrong plenty of times. They are human, just like the rest of us.”

The trial court retains discretion to impose reasonable time limits and to ensure argument does not stray unduly from the mark. (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) Although counsel may refer the jury to nonevidentiary matters of common knowledge, or from experience, literature, or history, he or she “‘may not dwell on the particular facts of unrelated, unsubstantiated cases.’” (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 122.) Here, Redfearn was given the latitude to challenge the witnesses’ identifications; the two instances where the trial court redirected defense counsel involved the specifics of nonevidentiary matters outside the evidence presented at trial. However, notwithstanding the deficiencies in some of the witnesses’ identifications, other

witnesses' identifications were more precise and therefore more compelling. On this record, Redfearn has failed to demonstrate prejudicial error.

II. As the People Concede, the Evidence Was Insufficient to Support the Finding that Redfearn's Prior Conviction Constituted a Serious Felony.

According to the amended information, Redfearn suffered a prior conviction in 1994 for violating Penal Code section 246.3 (all further statutory references are to the Penal Code) which constituted a prior serious felony (§ 667, subd. (a)(1)) and a "strike" under the Three Strikes Law (§§ subds. (b)-(i), 1170.12, subds. (a)-(d)) in addition to serving three prior prison terms (§ 667.5, subd. (b)). He waived his right to a jury trial and proceeded to a bench trial on these allegations. The prosecutor introduced two packets of certified prison records and submitted the matter. (§ 969b.)

With respect to the section 246.3 conviction, the prison packet contained a prison chronological history, and abstract of judgment, a fingerprint card and a photograph of Redfearn. According to the abstract of judgment, on July 14, 1994, Redfearn plead guilty to one count of violating section 246.3 in 1993. The "CRIME" box bore the notation "DISCHARGE F/ARM PUB." There was no indication any enhancements were found true.

As the People acknowledge, "[i]f the prior conviction was for an offense that can be committed in multiple ways and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred." (*People v. Miles* (2008) 43 Cal.4th 1074, 1083.)

As this offense is not listed as a serious felony in section 1192.7, the mere fact of a section 246.3 conviction does not necessarily establish the offense as a serious felony (see *People v. Leslie* (1996) 47 Cal.App.4th 198, 201), but subdivision (c)(8) of section

1192.7 specifies “any felony in which the defendant personally uses a firearm” is a serious felony. Here, however, as the People concede, the proffered evidence merely proved Redfearn had been convicted of discharge of a firearm in a grossly negligent manner; it did not establish he had personally used a firearm in the commission of that offense. Accordingly, this matter is properly remanded for a new trial on the prior conviction allegations. (*People v. Barragan* (2004) 32 Cal.4th 236, 259.)

III. In Light of the Remand for Retrial on the Sentencing Allegations, the Abstract of Judgment Does Not Require Correction Here.

Redfearn says there are discrepancies between the oral pronouncement of judgment and the abstract of judgment. In light of the remand for a new trial on the prior serious conviction allegation, Redfearn will have the opportunity to address these contentions before the trial court.

DISPOSITION

The matter is remanded to the trial court for a new trial on the prior conviction allegations; otherwise, the judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.